SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 1284

IN THE MATTER OF THE PETITION
of
LEO ROBERT FORCELLA
for a Writ of *Habeas Corpus*.

LEO ROBERT FORCELLA,
Petitioner.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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1 Wharton, Criminal Evidence (11th Ed. 1935):

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LEO ROBERT FORCELLA,

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Leo Robert Forcella, your petitioner, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit, entered in the above case on January 17, 1967.

Opinion Below

The opinion of the Court below, as well as the dissenting opinion of the minority of said Court, has not yet been re-

ported. The two-to-one opinion may be found, *infra*, as follows, majority opinion, Appendix A, P1a to P20a-19; dissenting opinion, Appendix A, P20a-20 to P25a-13.

Jurisdiction

The judgment of the court below in this civil action was entered on January 17, 1967. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(a).

Statement of Questions Involved

1. Were the lower courts justified in refusing to afford petitioner any factual evidentiary hearing upon uncontradicted factual allegations, in the state and federal courts, of a denial of due process during a trial for common law murder resulting in the death penalty?

2. Did the Court of Appeals do violence to established constitutional law by refusing to direct the district court to grant *habeas corpus* relief where the uncontradicted record and supplementary affidavits showed: (a) a trial atmosphere of prejudice, with a jury biased during *voir dire* by discussion of a prior murder conviction against petitioner; (b) substantial portions of evidence suppressed "in chambers, off the record, and outside the presence of the defendant"; (a) a hostile court, which foreclosed petitioner's right to speak out, and held four portions of the trial outside petitioner's presence?

3. Does the dissenting opinion of the Court of Appeals raise sufficient matters of importance justifying this Court's review, in a capital case, relating to (a) constitutional safeguards against use or mention of a prior murder conviction before a jury determining not only guilt but also punishment of petitioner; (b) suppression of important evidence, in chambers, relating to events during ten years spent by petitioner in jail?

Constitutional Provisions Involved

The Fourteenth Amendment, Section 1, to the United States Constitution provides: "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privilges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Statement of Case

The Grand Jury of Essex County indicted Leo Robert Forcella on February 24, 1960 for common law murder. Trial was commenced on May 2, 1960 and the jury returned a verdict of guilty of first degree murder without a recommendation of mercy on May 13, 1960, the same day upon which Leo Robert Forcella was sentenced to death by electrocution (P1270a to P1272a-30).

Forcella's automatic appeal to the New Jersey Supreme Court was unsuccessful. *State* v. *Forcella,* 35 N. J. 168 (1961). State Court proceedings to prevent execution were also unsuccessful and, though this Court stayed execution on January 29, 1962, it refused to grant certiorari, without opinion, on April 31, 1962. 369 U. S. 866, 8 L. Ed. 2nd 86 (1962).

Forcella sought a writ of *habeas corpus* before the United States District Court for the District of New Jersey on June 25, 1962. The district court dismissed the action, without prejudice, on the ground that state court remedies had not yet been exhausted (P1281a to P1282a).

Forcella filed a verified complaint for *habeas corpus* in the Superior Court of New Jersey, Essex County. A judge of that court, upon finding that meritorious questions were presented, stayed execution and ordered the State of New Jersey to show cause why a writ of *habeas corpus* should not be granted (P1283a to P1284a).

Forcella's case was reassigned to the trial court sitting during the murder trial; Forcella's request that this trial court disqualify himself as well as Forcella's request to examine jurors, were both denied (P1327a-30 to P1334a-50). See also R.R. 1:25A, *Rules of Supreme Court of New Jersey.* Even though the State of New Jersey failed to file a single affidavit against Forcella's verified complaint or refuting the affidavits presented with the complaint, the trial court dismissed the petition for a writ of *habeas corpus* on the grounds that the Superior Court of New Jersey did not have "jurisdiction" to hear the matter (P1334a-39 to P1363a-21).

Forcella's direct appeal to the New Jersey Supreme Court was denied. *In re Forcella,* 40 N. J. 309 (1963). On July 19, 1963 Forcella filed a petition for stay of execution with the United States Supreme Court and Justice Potter Stewart denied this petition with an endorsement that it was unnecessary to proceed before the United States Supreme Court (P5a-11 to 15).

Forcella reinstituted his petition for writ of *habeas corpus* in the United States District Court for the District of New Jersey on July 25, 1963 (P2a to P19a). Again the State of New Jersey did not controvert a single issue raised by the affidavits and verified petition.

Since an Order to Show Cause as to why *habeas corpus* should not issue to bring Forcella before the court to hold a hearing, was at issue, counsel for Forcella rested upon

the voluminous record before Judge Coolahan (P1393a-17 to 19). Such counsel never, of course, waived the right to a hearing, which they had been seeking throughout the state and federal courts. Judge Coolahan, in an unreported decision, dismissed the petition without a hearing and without allowing *voir dire* of the murder trial jurors in July 1964 (P1378a to P1394a). Judge Coolahan certified probable cause of appeal on September 1, 1964 (P1404a).

Forcella appealed to the United States Circuit Court of Appeals for the Third Circuit on September 11, 1964. The case was argued on April 15, 1966 and decided adversely in January, 1967, with one judge dissenting (P1a to P25a-13).

The Jury

The panel of jurors chosen for the Forcella trial were indoctrinated in an atmosphere of prejudice and bias. During the *voir dire,* conducted openly before all chosen as well as prospective jurors, the trial court allowed one juror to express the hope, before the entire panel, that Forcella not be turned loose to murder for a third time (P209a-15 to 17); another, to express the opinion that he thought, without hearing the facts, that Forcella was really guilty (P213a-3 to 20).

Without any word of caution to the jurors assembled, the trial court allowed the jurors to be informed that press indications were that Forcella was guilty (P475a-2 to 3).

Time and time again, prospective jurors, in the presence of the panel already selected to sit, told of the newspaper accounts convincing them that Forcella was guilty (P310a-19 to P312a-23; P388a-10 to P389a-12; P427a-21 to P429a-2; P474a-18 to P478a-1; P503a-23 to P505a-2; P592a-7 to P598a; P657a-4 to P658a-5; P673a-2 to 18; P686a-11 to P687a; P697a-9 to P700a).

Those jurors chosen, and sitting, of their own uncontradicted admissions, exhibited a determination not to afford Forcella a fair trial:

> The Foreman of the jury, Mr. Willard A. Lynch, during *voir dire,* was asked, if selected as a juror, "would you be willing to give the Defendant the benefit of any reasonable doubt that arose in your mind, either from the evidence, or lack of evidence, in the case?" Mr. Lynch's unequivocal answer was "No." The Courts below, and especially the concurring opinion of Justice Schettino in the New Jersey Supreme Court, have taken the position that "No means yes." *See* 40 N. J. 312. Forcella has been denied the right to examine juror Lynch. (P49a-20 to P54a-18).
>
> Another juror, Mr. William F. Hoffman, was asked if he could "approach the case with an open mind, and presume the Defendant to be innocent of the charge and the indictment?" Mr. Hoffman answered equivocably, "If innocent, yes, Sir." Forcella's counsel have not been allowed to question Mr. Hoffman since the trial. Especially where Mr. Hoffman was called upon to consider punishment as well as guilt, it was essential that he keep an open mind under any circumstances. (P525a to P533a-14, but see P531a-2 to 7).
>
> Juror Charles J. Lord, Jr., like Mr. Hoffman, also acknowledged only an inclination toward contingent fairness in this case. When asked if he were selected as a juror in the case, "could you approach it with an open mind and presume the Defendant to be innocent of the charge?" Mr. Lord followed suit. He answered, "If the facts showed that he was innocent, I could, yes." (P552a-6 to P558a; but see P555a-16 to 20). Forcella's counsel were likewise refused the

right to question Mr. Lord, in these proceedings. These last two jurors, it is noted, were chosen as Nos. 11 and 12 on the panel and their equivocation could not but have made a lasting impression on the others.

The difficulties of communications concerning Juror No. 9, Louis E. Liquori, make any positive statement concerning his *voir dire* impossible. We note first that it appears that a fellow worker of his at employment was the celebrated juror in the *DeVita* case, *Cf. United States* v. *McCorkle,* 133 F. Supp. 169 (D. C. N. J. 1955). This question was never pursued or inquired into. Mr. Liquori, like Mr. Kunnle of *De Vita,* was not frank as to his involvement or associate's involvement in prior incidents of violence; even though the circumstances were almost identical, and Mr. Kuhnle (spelled Cunley in the record) were fellow supervisors of Western Union on Broad Street, Newark, New Jersey, Mr. Liquori at first denied any involvement. (P437a-5 to 12) (*Cf.* P437a-8 to 11 with P441a-1 to 16). While his son was a police officer in the Town in which this juror lived, Mr. Liquori first appeared to state this would affect his ability to judge (P440a-7 to 9); then answered negatively to a question formed with a negative, as to this fact's effect on his judgment (P440a-10 to 12). After a misleading exchange between the Prosecutor and the Court concerning the juror's assumption versus presumption of Defendant's innocence, the juror stated he would not follow the law in that regard (P444a-12), but then he was lead to the proper answers by the Court. In any event, absent a post-trial examination of this juror, his fairness was certainly open to serious question.

Venireman Paul Kelly, who was the subject of the intensive investigation in the Court's chambers, gave particular emphasis to the degree of influence the prejudicial newspaper articles played with the jury. When asked if anyone had spoken to him, Kelly immediately replied "I have heard people talk that there was an article in the paper this morning about it". (P263a-11 to 17).

Jurors Kenyon Jones (P31a), Francis X. Hirt (P136a), John Hinchliffe (P367a), and Louis Liquori (P436a), were never even questioned, at any time, as to their preconceived knowledge of the case from the newspapers. In the last two days of *voir dire*, where it was apparent that both the prejudicial newspaper articles and the prospective jurors challenged for prejudice were increasing in intensity, the last four jurors chosen admitted facts showing they were fully subject to the rising hostile public opinion against Forcella: Juror Hoffman admitted he "might have roughly" read some of the prejudicial articles (P530a); Juror Lord admitted that he had heard "little sketches here and there" about the case since he had been on the jury (P555a); Juror Holmes admitted that he had read a newspaper article "just outlining the facts" of the case, from which he had "just the natural human reactions reading the piece" (P604a); and Juror Hammond admitted that he had read about the case "just in passing." (P713a)

The Trial

Only a full evidentiary hearing can establish the full facts of hostility and prejudice. Nevertheless, sufficient matters appear on the face of the bare trial record to establish the violations of due process. On three occasions, Forcella attempted to make a statement to the jury on his own behalf (P1104a-9 to 13; P1121a-16 to 19; P1185a-8 to 20), only to be interrupted, silenced, and castigated. Dur-

ing Forcella's direct and cross-examination, the Court continually interrupted, to either assist the Prosecutor, or admonish the Defendant (P1113a-35 to 40; P1114a-6 to 20; P1119a-23 to 25; P1120a-34 to 35; P1124a-15 to 18; P1125a-18 to 20; P1129a-23 to 24; P1130a-23 to 26; P1132a-33 to 36; P1132a-40; P1135a-24 to 27; 31 to 40; P1139a-28 to 31; P1140a-35 to P1141a-7; P1146a-12 to 17; P1147a-39 to 40; P1148a-24 to 28; P1152a-5 to 11; P1154a-34 to 39; P1156a-8 to 15; P1159a-13 to 17). Forcella was forced to remark at one point that he was not in Russia! (P1185a-12).

Four substantial portions of the trial took place in the Court's chambers, without the Defendant present. Concerning two of these incidents, in their entirety, we shall never be able to fully assay the prejudice ensuing because no stenographic transcript was taken (P1074a-8 to P1075a-12; P1325a). Concerning a third portion of the trial, the predeliverance discussion of the Court's charge, the Court and counsel, at the command of the trial court, went off the record for most of the chambers discussion (P1252a to P1254a).

A prospective juror, during an air raid drill, committed the error of acknowledging the acquaintance of Forcella's nephew in a Courthouse corridor.* A full inquisition ensued by the Court in chambers, in almost a keystone manner, revealing the great hostility and suspicion which the Court and its personnel bore toward the defense (P259a to P272a).

Counsel and the court reporter were called into chambers. Forcella was left either in Court alone or returned to incarceration. At least juror Kelly was interrogated by court officials: some "two girls", apparently jurors,

* Not brother, as stated by the Court below (P1388a-18 to 22).

were also questioned (P260a-1). Juror Kelly's name was peremptorily stricken from the list for the remainder of the term, and the rest of the panel could not help but observe his disappearance. Potential defense witnesses were interrogated as to whether or not they would be testifying, a fact completely outside the realm of any legitimate inquiry (P260a-1 to 5).

Forcella could not object to this procedure, or his absence from the chamber inquiry, since, not being present, he could not know what was happening and if he was being prejudiced. In any event, it is admitted that Forcella was not allowed to be present during this portion of the empaneling of jurors.

The records of the New Jersey Parole Board, relating to ten of the eleven preceding years of Forcella's life, were subpoenaed, as was Chairman Harold Ashby of that agency. The trial transcript merely shows an innocuous stipulation of counsel at this time during trial (P1047a-8 to P1075a-12). Since Forcella was denied presence at what really ensued in chambers, again he was unable to object to the procedures, or to show at this time the real prejudice against him, without a full evidentiary hearing.

When Chairman Ashby appeared with the parole board records pursuant to subpoena, he was accompanied by a Deputy Attorney General of the State of New Jersey (P1325a-50 to P1326a-20). This Deputy Attorney General opposed Mr. Ashby's testimony and trial counsel, as well as the Prosecutor of Essex County, were called into chambers without the Defendant or a Court reporter being present. A claim of privilege by the State of New Jersey concerning the records was made (*Ibid.*). It does not appear that these New Jersey records were even examined; some form of discussion ensued (*Ibid.*). A stipulation was reached. Only one single parole board document was made

available. Yet, despite this "stipulation", we see the defense case still attempted to prove what the records of the State of New Jersey actually showed (P1143a-11 to P1149a-26). On the other hand, it is clear that the full records of the State of New Jersey were made available, in advance of trial, to witnesses for the prosecution in rebuttal against the Defendant (P1214a to P1229a).

Though prejudice is always presumed in such circumstances, it is clear that Forcella was *actually* deprived of evidence on behalf of his defense. Because of the ten year incarceration, such records contained the most minute and intimate details of Forcella's life: why was he given parole, the first time he came before the Board? What was Forcella told of the psychiatrist's recommendation that he only be paroled, conditionally upon continued psychiatric treatment? What did the parole board's medical records, especially as to blacking out, show relating to the ten year imprisonment? Wouldn't the Parole Board records confirm or refute Forcella's claim that in the first six to ten weeks in State's Prison, he blacked out and was carried, by the guards, to the prison hospital? Had Forcella's jail record been consistent with the hedonistic personality portrayed by the Prosecutor and the one psychiatric report made available to the defense? Was the 1958 psychiatric examination of Dr. Arangio, the report of which was stipulated as admissible, the only psychiatric examination given Forcella during his ten years in prison? The State of New Jersey does not deny that "many pertinent records of the State of New Jersey were not brought before the Court and the jury * * *" as a result of this "in-chambers" motion to suppress by Deputy Attorney General Urbaniak (P9a-2 to 6). Only a hearing can show any court the real truth.

Forcella also subpoenaed the Honorable James Giuliano, of the Essex County Court, to testify in his behalf (P1325a-

30 to 31). Again, counsel were called into chambers, prior to Judge Giuliano taking the stand, for a "conference" (P1325a-31 to 36). Forcella was not present but he was deprived of the testimony of this witness by a stipulation made in chambers (P1325a-36 to 42). Judge Giuliano's testimony was deemed pertinent enough to admit into evidence; yet Forcella was not allowed to have this witness present and testifying on his behalf.

When time came for the Court and counsel to discuss the charge to the jury, again the scene shifted to chambers with Forcella excluded (P1252a to P1254a). Numerous decisions were made by his counsel, presumably, and the Court ordered the proceedings "off the record" (P1252a).

The Court was later to instruct the jury, contrary to any evidence in the entire case, that "the contention of this defendant [is that] his blackout was brought about on this particular occasion by the impact on his impaired mental and neurological state, by the events of that day that preceded the slaying, including his indulgence in alcohol." (P1259a-37 to P1260a-5). The Court also instructed the jury: "The other contention of the defendant is that at the time of the slaying he was in a state of intoxication" (P1260a-7 to 8).

Such instructions were strange in that the Defendant never so contended, in either regard! No evidence was offered by the defense to support either said contention! Except for association with migraine headaches, Forcella continually maintained that he had no knowledge whatsoever of these blackouts (P1143a-11 to P1151a-12). On repeated occasions, Forcella maintained that he was sober—not intoxicated (P1162a-33 to 35; P1165a-32 to 37; P1166a-29; P1167a-23; P1168a-9 to 24; P1169a-10 to 14; P1175a-5 to 16). Thus, the trial court set up for the jury, strawmen of defense contentions that were not supported by any

evidence in the case. It can only be presumed that had Forcella been present in the "secret" chamber conference to determine the charge, such error never would have taken place.

The suppression of evidence in the case continued throughout the defense. As has been noted, Forcella's defense to the charge of murder was that he "blacked out" at the time of the commission of the homicides of both 1948 and 1960. So defense counsel promised to prove! (P733a-21 to P736a-13). In April, 1960, Forcella was examined by a Dr. Flicker for the purpose of the coming trial (P1322a-20 to 28). Such examination appears to have been satisfactory for defense purposes since no further request for examination was made and the defense continued to press its "blackout" theory, even to the point of bringing in the circumstances of the 1948 killing. Dr. Flicker appeared at the courthouse during trial, to testify (P1322a-32 to 34).

The Complaint in this case, which has never been controverted by the State, in these proceedings or in proceedings almost identical in the State courts (P1288a-37 to 45), reveal the following:

> "During the course of the trial, Dr. Flicker appeared in the courtroom but was brought to the Prosecutor's office and spent substantial time under interrogation in the Prosecutor's office.
>
> "Thereafter, Dr. Flicker did not testify on behalf of Petitioner, although prior to said time, the said psychiatrist had informed the Petitioner that his opinion as a result of the examination would be extremely helpful to him." (P10a-5 to 13).

Forcella asked Mr. Sommers why Dr. Flicker did not testify and was told "we do not need him." (P1322a-32 to

41). Forcella also states, without contradiction, that assistant defense counsel, Mr. Comissa, informed him that someone had told Dr. Flicker "not to testify if he wanted to get anymore work." (*Ibid.*). This is undenied!

The significance of Dr. Flicker's unexplained disappearance and the Court's charge as to the defense contentions of "black-out" and "intoxication," can best be viewed in light of the strange silence on the part of the Prosecutor in this case! Never once did he comment on the failure of the defense to present psychiatric testimony by a psychiatrist actually examining the Defendant after the February 4, 1960 killing! Never once did the Prosecutor comment upon Dr. Flicker's failure to testify! Even more strange is that the trial Court charged the jury along the lines of the psychiatric defense contentions that would normally be presented by an examining psychiatrist, even though the defense had not submitted any expert evidence concerning "black-out" or intoxication (*Cf.* P1075a-26 to P1090a-9). The circumstances show that Dr. Flicker's actual presence (similar to Chairman Ashby and Judge Giuliano) was suppressed, but for the purposes of the jury charge, he was given the benefit of what such testimony would have been!

Reasons For Granting Writ

POINT ONE

The Circuit Court erred in refusing to order an evidentiary hearing.

The District Court dismissed Forcella's petition for *habeas corpus* contrary to the holding in, but identical to *Williams* v. *Kaiser,* 323 U. S. 471, 473-474, 89 L. Ed. 398, the circumstances of *Williams* v. *Kaiser,* 323 U. S. 471, 473-474, 89 L. Ed. 398, 401 (1945):

> "The petition for habeas corpus was denied without requiring the State to answer or without giving petitioner an opportunity to prove his allegations. And the allegations contained in the petition are not inconsistent with the recitals of the certified copy of the sentence and judgment which accompanied the petition and under which petitioner is confined. Hence, we must assume that the allegations of the petition are true * * * Read in that light we think the petition makes a *prima facie* showing of denial of the constitutional right."

The District Court without any hearing proceeded to adjudicate all factual allegations contrary to Forcella's petition and the undisputed affidavit of Forcella, Esther Forcella and Vincent Comissa, Esq:

(1) the District Court found that defense counsel made "no objection to any of the challenges", regarding capital punishment, contrary to the face of the record (P1385a-2 to 12);

(2) the District Court made findings of fact regarding the harmless effect of the admitted bias of jurors, without even allowing any examination of these jurors (P1385a-12 to 22);

(3) the District Court made findings of fact as to the atmosphere of hostility exhibited by the trial court, without ever allowing a hearing thereon (P1385a-23 to P1386a-6);

(4) the District Court approved inflammatory, nauseating and misleading "Lover's Dream" panties, blood-stained brassiere and nude photographs of the victim, without comment (P1386a-7 to 21);

(5) the District Court made factual findings as to the propriety of in-chambers conferences, from which Forcella was excluded, resulting in the suppression of evidence on behalf of the defense;

(6) the District Court found, also, that the Defendant intelligently waived his rights to confrontation of, or ability to present, witnesses, as a result of decisions made out of his presence, again upon no evidence as to what actually caused this suppression of evidence, and despite the "gagging" of Forcella (P1386a-22 to P1388a-14);

(7) the District Court made an unsupported factual finding, without allowing Forcella to inquire therein that the in-chambers inquisition as to defense tampering with the jury was "had without the knowledge of the other members of the jury panel" (P1388a-19 to P1389a-6);

(8) the District Court made a finding of propriety as to the "off the record" discussions between Court and counsel of the jury charge discussion, without ever learning what did take place in chambers; and without even considering what effect, if any, such discussions had upon counsel's summation or the unsupported charge as to defense contentions (P1389a-7 to 15);

(9) the District Court chose to ignore, because "unsupported by way of affidavit or statement from either defense counsel or the psychiatrist" (and we pause to wonder how the District Court conceived present counsel could ever obtain such damaging admissions from these parties), and dismissed, Forcella's uncontradicted facts showing that he was deprived of the psychiatric defense testimony of Dr. Flicker by cir-

cumstances of improper suppression (P1389a-16 to P1390a-6);

(10) the District Court found that the factual circumstances of the trial, without ever holding any hearing, were not shocking or contrary to fair play (P1390a-6 to 16);

(11) lastly, the District Court found no unfairness, under the unique factual circumstances of administering punishment (P1392a-1 to 15).

The case of *Townsend* v. *Sain*, 372 U. S. 293, 9 L. Ed. 2d 770 (1963), establishes the standards under which a United States District Court, upon application for federal *habeas corpus* challenging a state court conviction, must hold an evidentiary hearing; see also *Annotation, Necessity of Hearing in Federal Habeas Corpus Proceedings Challenging Validity of Conviction of Crime—Supreme Court Case*, 9 L. Ed. 2d 1246, 1247.

Lest there be any question as to whether Forcella was ever afforded a proper hearing in the state courts, we pause to note that County Court Judge Lyons dismissed, without hearing, on the unprecedented ground that the Superior Court of New Jersey was without jurisdiction to entertain Forcella's *habeas corpus* proceeding (P1362a-8 to 19). *Cf. New Jersey Constitution of 1948*, Art. I, ¶14; *State* v. *Cynknowski*, 10 N. J. 571 (1952); *In re Leibowitz*, 43 N. J. Super. 579 (App. Div. 1957); *Application of Foas*, 42 N. J. Super. 31 (App. Div. 1956); *State* v. *Lenkowski*, 24 N. J. Super. 444 (App. Div. 1953).

The New Jersey Supreme Court, upon appeal, did not discuss the jurisdictional basis of the lower state court decision. The New Jersey Supreme Court appellate proceedings did not satisfy the doctrines of federal law. *Townsend*

v. *Sain, supra,* 372 U. S. at 318-320, 9 L. Ed. 2d 770, 789 (1963); *Fay* v. *Noia,* 372 U. S. 391, 422-427, 9 L. Ed. 2d 837, 859-861 (1961).

The District Court, in dismissing the uncontradicted petition, did not even discuss the refusal to allow Forcella a hearing under prevailing United States Supreme Court doctrines. In scanning the record as it did, the Court appears to have been guided by the outmoded "exceptional circumstances" and "vital flaw" tests of *Brown* v. *Allen,* 344 U. S. 443, 97 L. Ed. 469 (1953).

The Court of Appeals majority relied upon an *ex parte* docket entry of some unknown clerk that the "matter would be submitted on the trial record and briefs to be filed" as reason to deny a hearing (P3a-17 to 20). Nevertheless, the "matter" was solely the question, on return of Order to Show Cause, of whether jurors could be interrogated and whether a hearing would be held.

Upon the substantial constitutional questions alleged, we respectfully urge that an important question is raised as to whether the lower court erred in refusing to hear the facts brought forward by this cause. *Cf. Jennings* v. *Ragen,* 358 U. S. 276, 3 L. Ed. 2d 296 (1959); *Chessman* v. *Teets,* 350 U. S. 3, 100 L. Ed. 4 (1955); *Massey* v. *Moore,* 348 U. S. 105, 99 L. Ed. 135 (1954); *Price* v. *Johnston,* 334 U. S. 266, 92 L. Ed. 1356 (1948). We respectfully urge this Court to grant a writ of certiorari to review the Circuit Court's refusal to follow established *habeas corpus* law as to evidentiary hearings, in the Third Circuit.

POINT TWO

Forcella was denied due process of law by an unfair jury and hostile judge.

A substantial portion of the jury in this case admitted more prejudice than could be proven in the case of *United States* v. *McCorkle*, 248 F. 2d 1 (3 Cir. 1957). The Foreman of the jury would not give Forcella the benefit of any reasonable doubt; two other jurors would presume Forcella innocent only if proved such fact. Juror Liquori was a fellow employee of Mr. Kuhlne of the *DeVita* case; *see also United States* v. *McCorkle*, 133 F. Supp. 169, 173 (D. C. N. J. 1955), but denied that any fellow employee had been victim of a crime of violence.

This Court has ruled:

> "It is vital in capital cases that the jury should pass upon the case free from external causes tending to disturb the exercise of deliberate and unbiased judgment. Nor can any ground of suspicion that the administration of justice has been interfered with be tolerated." *Mattox* v. *United States*, 146 U. S. 140, 149, 36 L. Ed. 917, 921 (1892).

The *Mattox* case continues with special regard to the Court officers' interrogation of Paul Kelly, prior to his being brought into chambers:

> "Private communications, possibly prejudicial, between jurors and third persons, or witnesses, or the officer in charge, are absolutely forbidden, and invalidates the verdict, at least unless their harmlessness is made to appear." 146 U. S. at 150.

Inquiry into the prejudicial nature of these activities made because the Courts of New Jersey removed this constitutional protection from convicted persons, *Cf.* R.R. 1:25A.

A trial permeated with prejudice by reason of news accounts of the "facts" and proceedings does not fulfill the standards of due process of law. *Turner* v. *Louisiana, supra; Rideau* v. *Louisiana*, 373 U. S. 723, 10 L. Ed. 2d 663 (1963); *Irvin* v. *Dowd*, 366 U. S. 717, 6 L. Ed. 2d 751 (1961).

Both federal and state courts have recognized the pernicious effect upon a jury of informing the panel of prior criminal activities, prior to trial, related to the offense for which defendant is being tried. *See Marshall* v. *United States*, 360 U. S. 310, 3 L. Ed. 2d 1250 (1959); *Leonard* v. *United States*, 12 L. Ed. 2d 1028 (1964); 1 *Wigmore, Evidence*, 3rd Ed. (1940) §57; 1 *Wharton, Criminal Evidence*, 11th Ed. (1935) §330. It was stated in *Michelson* v. *United States*, 335 U. S. 469, 475-476, 93 L. Ed. 168, 173-174 (1948):

> "The state may not show defendant's prior trouble with the law, specific criminal acts, or ill name among his neighbors, even though such facts might logically be persuasive * * * The inquiry is not rejected because character is irrelevant; on the contrary, it is said to weigh too much with the jury and to so overpersuade them as to prejudge one with a bad general record and deny him a fair opportunity to defend against a particular charge."

See also, Boyd v. *United States*, 142 U. S. 450, 395 L. Ed. 1077 (1892).

The majority opinion justifies the discussion before the trial jury in *voir dire* of Forcella's prior murder conviction contrary to its own prior decision in *United States* v. *Banmiller*, 310 F. 2d 720 (3 Cir. 1962) [*but see United States*

v. *Myers*, 311 F. 2d 311 (3 Cir. 1963)]. Chief Judge Biggs, referring to the jurors' instruction to disregard past convictions on the question of guilt, stated:

> "Certainly such a feat of psychological wizardry verges on the impossible even for berobed judges. * * *" 310 F. 2d at 725.

See also *Nash* v. *United States*, 54 F. 2d 1006, 1007 (2 Cir. 1932).

Intertwined with the deinal of Forcella's right to have evidence presented in his behalf, and also the right to remain silent on the 1948 killing, was Forcella's right to participate in his own defense. There is no question that Judge Lyons, in 1960, effectively precluded Forcella from objecting to any of the prejudicial irregularities happening during the trial:

> "Wait a minute. Let me admonish you not to make any speeches. You listen to the questions and answer them. You are very ably represented here and if Mr. Sommer or associate counsel deem it necessary to interpose objections they will do so and I will rule on them." (P1185a-14 to 20: *Cf.* P1104a-9 to 13).

The trial court's conduct, in refusing to allow a defendant to participate in his own defense, by analogy, was condemned in *Adams* v. *United States*, 317 U. S. 269, 280, 87 L. Ed. 268, 275 (1953):

> "an arbitrary rule that a man cannot chose to conduct his defense before a judge rather than a jury, unless, against his will, he has a lawyer to advise him, although he reasonably deems himself the best advisor for his own needs, is to imprison a man in his privileges and call it the Constitution."

See also United States v. *Dennis*, 183 F. 2d 201, 234 (2 Cir. 1950), *aff'd.* 341 U. S. 494, 95 L. Ed. 1137; *United States* v. *Mitchell*, 137 F. 2d 1006, 1010 (2 Cir. 1943); *Collins* v.

Heinze, 125 F. Supp. 186, 190 (D. C. Calif. 1954), *aff'd.* 217 F. 2d 62 (9 Cir. 1954). An opportunity of the Defendant to be heard is "immutable" and fundamental to a free society. *Powell* v. *Alabama*, 287 U. S. 45, 68, 77 L. Ed. 158, 170 (1932). An "adequate opportunity to be heard in defense" of a criminal charge may never be taken away, consistent with due process; at all times an accused may supersede counsel and conduct the trial himself. *Synder* v. *Massachusetts*, 291 U. S. 97, 105, 78 L. Ed. 674, 676 (1934). *See also*, *Mac Kenna* v. *Ellis*, 263 F. 2d 35, 40-41 (5 Cir. 1959); *Ibid.* 280 F. 2d 592 (5 Cir. 1960).

POINT THREE

Forcella was denied due process of law by the suppression of evidence.

Due process of law is violated by any act or omission to act that deprives a defendant of "an opportunity to present such evidence as he has" whether the State's participation be direct or indirect. *Mooney* v. *Holobran*, 294 U. S. 103, 112, 79 L. Ed. 790, 794 (1935). The opportunity of an accused to meet the prosecution's case with the aid of witnesses is historically and in practice fundamental to a fair trial. *Powell* v. *Alabama*, 287 U. S. 45, 77 L. Ed. 158 (1932); *Paoni* v. *United States*, 281 F. 801, 802 (3 Cir. 1922); *Mac Kenna* v. *Ellis*, *supra*.

The deliberate suppression by state authorities of evidence favorable to the accused entitles an applicant to a *habeas corpus* and release. *Pyle* v. *Kansas*, 317 U. S. 213, 216, 87 L. Ed. 214, 216 (1942); *Napue* v. *Illinois*, 360 U. S. 264, 3 L. Ed. 1217 (1959).

The Third Circuit has frequently supervised the guarantees of state convicts to their constitutional right to have

all evidence available for defense. However, in this case, the same Circuit's majority, upon a chaueanistic support of defense counsel at trial fails to recognize the improprieties. (See Appendix A, P4a-34 to 36; P18a-1 to 22). As stated in *Curron* v. *State of Delaware,* 259 F. 2d 707, 711 (3 Cir. 1958):

> "* * * the trial of a capital case, or indeed any other trial, no longer can be considered properly a game of wits and skills. It is clear that men on trial for their lives are entitled to all pertinent facts relating to their defense and that no witness is entitled to constitute himself the judge of what the court shall hear."

See also, United States v. *Dye,* 221 F. 2d 763, 765 (3 Cir. 1955); *United States* v. *Rutkin,* 212 F. 2d 641 (3 Cir. 1954); *United States* v. *Baldi,* 195 F. 2d 815, 820 (3 Cir. 1952).

POINT FOUR

Forcella was denied due process of law in a capital case by proceeding in the absence of the accused.

The absence of the accused, at any time after indictment, up to the final verdict and sentencing was discussed in *Hopt* v. *People of Utah,* 110 U. S. 574, 28 L. Ed. 262 (1884):

> "The necessities of the defense may not be met by the presence of his counsel only. For every purpose, therefore, involved in the requirement that the defendant shall be personally present at the trial, where the indictment is for a felony, the trial commences at least from the time when the work of impaneling the jury begins." 110 U. S. at 578, 28 L. Ed. at 265.

The requirement that the Defendant be present throughout every action relating to the trial has been called "a leading principle that prevades the entire law of criminal procedure." *Lewis* v. *United States,* 146 U. S. 370, 372, 36 L. Ed.

1011, 1012 (1892). "The presence of a defendant is a condition of due process to the extent that a fair and just hearing would be thrwarted by his absence, and to that extent only." *Snyder* v. *Massachusetts,* 291 U. S. 97, 102-108, 78 L. Ed. 674, 679 (1934); *Cf. United States* v. *Behrens,* 375 U. S. 162, 11 L. Ed. 2d 224 (1963).

The defendant was not present when juror Kelly was challenged. The Third Circuit in *United States* v. *Johnson* held: "The defendant must be in court when jurors are challenged." 129 F. 2d at 958.

The defendant was not present when witnesses and records were suppressed—when the trial court devised the unsupported contention that the defendant claimed he was intoxicated at the time of the killing. *Cf. Hopt* v. *People of Utah,* 110 U. S. at 582, 28 L. Ed. at 266. Such actions were important, substantial and prejudicial to the accused; as stated in *Near* v. *Cunningham,* 313 F. 2d 929, 931 (4 Cir. 1963):

> "The fact that the court consulted with counsel on this point is indicative of this. No decision made during the trial was more fateful to the defendant than this."

While the Fourth Circuit discussed the absence of a defendant during a discretionary decision as to whether the jury should be allowed to go unsequestered, the thrust of the Court's reasoning is equally applicable to determinations of the defenses right to witnesses and the defense's contentions in defense. *See also Crowe* v. *United States,* 200 F. 2d 526 (6 Cir. 1952).

The record is absolutely barren, following most recesses or at the start of morning and afternoon sessions, of a showing that Forcella was present when the *voir dire* and trial,

itself, were proceeding. The accused's right to be present is so essential to due process, his presence must be affirmatively shown on the fact of the record:

> "This is upon the ground of the peculiar sacredness of this high constitutional right. It is also true, as has been held by this Court, 'that nothing can be presumed for or against a record, except what appears substantially upon its face.' " *Lewis* v. *United States, supra,* 146 U. S. at 375, 36 L. Ed. at 1013 (1892); *See also Crowe* v. *United States,* 200 F. 2d 526, 528 (6 Cir. 1952).

There can be no countenance to a suggestion that Forcella waived his right to be present while he was incarcerated. *Cf. Diaz* v. *United States,* 223 U. S. 444, 56 L. Ed. 500 (1912). The possibility of waiver in this case is negated, in *Johnson* v. *Zerbst,* 304 U. S. 458, 464, 82 L. Ed. 1461, 1466 (1938).

> "It has been pointed out 'courts indulge every reasonable presumption against waiver' of fundamental constitutional rights and that we 'do not presume acquiescence in the loss of fundamental rights.' A waiver is ordinarily an intentional relinquishment or abandonment of a known right or privilege."

In a capital case, the accused cannot, even knowingly waive his right to be present at trial. *Hopt* v. *People of Utah,* 110 U. S. at 579, 28 L. Ed. at 265; *Diaz* v. *United States, supra,* 223 U. S. at 455, 56 L. Ed. at 505. To find a waiver in this case of Forcella's right to be present, would be to hold the equivalent: that an accused could blindly consent to a fraud.

CONCLUSION

We respectfully urge that sufficient reason appears in the capital case to grant a writ of certiorari to review the two-to-one decision and judgment of the United States Circuit Court for the Third Circuit.

Respectfully submitted,

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Attorney for Petitioner.

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 15120

IN THE MATTER OF THE PETITION OF LEO ROBERT FORCELLA FOR A WRIT OF HABEAS CORPUS,

LEO ROBERT FORCELLA,
Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

Argued April 15, 1966

Before McLAUGHLIN, GANEY and FREEDMAN, *Circuit Judges*

OPINION OF THE COURT

(Filed January 17, 1967)

By McLAUGHLIN, *Circuit Judge.*

Appellant was convicted of first degree murder in the New Jersey State Court and sentenced to death. The conviction was affirmed by the New Jersey Supreme Court, 35 N.J. 168 (1961). Petition for rehearing was denied December 11, 1961. Appellant's petition for certiorari was denied by the United States Supreme Court, 369 U.S. 866 (1962). Application was thereafter made to the United States District Court for the District of New Jersey for a writ of habeas corpus. That was denied June 26, 1962, without prejudice, for failure to exhaust state remedies. Appellant next sought such writ from the New Jersey Superior Court. As stated in the appeal from the denial

of that petition by the New Jersey Supreme Court, 40 N.J. 309, 311 (1963), "The matter was assigned to the judge who presided at the trial and a hearing was held on September 21, 1962. The petition was denied and the cause dismissed." The New Jersey Supreme Court affirmed that judgment, supra, holding p. 311 "The complaint seeking the writ contains eleven counts all of which are cast by the pleader in constitutional terms. We have considered the merits of the grounds advanced in the complaint and find no substance in any of them." After that a second habeas corpus petition was filed in the United States District Court for the District of New Jersey. The eleven counts of the petition were identical with those of the state court habeas corpus petition except that the paragraphs were renumbered.

With respect to the material that was before the District Judge and whether a hearing was indicated the Judge stated in his opinion:

> "In considering this present application this Court has secured a transcript of the entire jury selection procedure and trial. This transcript comprises some nine volumes of testimony. In addition the Court has had the benefit of detailed appendices supplied by counsel for the petitioner in which reference is made to the transcript and to which the full transcript of motion arguments are attached. In addition counsel for petitioner has submitted a brief apparently fully stating his position in the matter. At the date set for oral argument counsel for petitioner and the prosecutor agreed to waive same and rest their contentions on the file and the voluminous record of the proceedings. The Prosecutor's office submitted a copy of their brief filed with the Supreme Court in the State habeas corpus proceeding.
>
> "The Court has given this matter long and careful attention and has fully read and digested all of

> the material submitted. The nature of the case is admittedly grave. The petitioner's contentions have been given full consideration by the New Jersey Supreme Court. As heretofore stated, the same contentions are raised in this proceedings for habeas corpus relief. The arguments raised may all be determined from the record and the transcript of the proceedings. There are no new elements alleged or contentions made which would require a hearing in the matter."

Appellant clearly agrees with the above in his brief, p. 5, where he says: "Upon the question of whether or not a hearing would be held, counsel rested upon the voluminous record before Judge Coolahan." The particular docket entry of the District Court found in appellant's appendix also bears this out. The entry reads:

> "5-5-64 At call for hearing on petition for a writ of habeas corpus, Counsel indicated the matter would be submitted on the trial record and briefs to be filed. (Coolahan) (5-4-64)"

Our independent study of the state court record verifies completely the decision of the District Judge that in the full trial record plus the briefs and appendices of counsel he had everything before him necessary to his decision and that a hearing was not required. Townsend v. Sain, 372 U.S. 293 (1963); Brown v. Allen, 344 U.S. 443 (1953).

The District Court in a comprehensive, carefully documented opinion denied the application for the writ. Actually there would be no need or really justification for stating our views at any length except for the circumstance that on oral argument some question arose about evidence having been introduced at the voir dire and in the trial itself concerning a prior homicide by defendant for which introduction the state was responsible. To satisfactorily deal with that problem the factual picture should be briefly outlined.

For about a year prior to February 1960, appellant, then fifty-nine years old, had been very friendly with Marion Wetzel who at the time was fifty-two years old. On February 4, 1960, shortly after 6:00 P.M. he entered a Newark, New Jersey tavern which Miss Wetzel owned and operated. She was there and they quarreled. A little later a witness saw appellant outside the tavern at his car, return to the tavern and point a shot gun at Miss Wetzel. The witness heard a shot and observed Miss Wetzel fall. When the police arrived they saw appellant struggling with two men for his gun. Witnesses testified that appellant at the time said, "I shot her. She's behind the bar." A shot gun shell was obtained from appellant's pocket. In a statement to the police appellant said he had blacked out and had no knowledge of the shooting. In the brief for appellant it is admitted that "Forcella did not question, at anytime, that it was his act, by the use of a shot gun, that caused the death of Marion Wetzel."

Forcella was indicted for first degree murder. His trial started on May 2, 1960. It is asserted on his behalf that "The panel of jurors chosen for the Forcella trial were quickly and effectively indoctrinated in an atmosphere of prejudice and bias." Complaint is made that the voir dire was before the whole jury panel and the statement is made that during it "* * * the trial court allowed the propaganda to commence."

The assertion that there was substantial error by reason of the voir dire examination being conducted in the presence of the jury panel is specious. The New Jersey procedure for the selection of a jury in a capital case was meticulously followed by the trial judge. There was no mention whatsoever of holding an in camera session, no thought of it or need for it.

The unmistakable neutral atmosphere surrounding the entire selection of the jury and the meticulous fairness of the trial judge and counsel on both sides were evident immediately on the examination of the first panel member called. The prosecutor inter alia asked as follows:

"Q. Mr. Jones, you understand at this posture of the case that both defense counsel and I are going to ask you certain questions not for any personal reasons but because we are trying to get a fair and impartial jury both for the defendant and the State.

You appreciate that fact, don't you?"

The answer was "Yes".

The prosecutor explained carefully and correctly the indictment for first degree murder, the jury function including that "a person found guilty of murder in the first degree is subjected to the death penalty, unless the jury, after a consideration of all of the testimony and his Honor's instructions as to the law, recommends life imprisonment, in which case no other punishment shall be given."

In examination by the defense attorney the following questions and answers occurred:

"Q. Now, we are looking for a group of men and women as jurors in this case who can approach the case with an open mind, who can approach it without any prejudice or bias, who will give the defendant the benefit of every reasonable doubt that might arise from the evidence and give the defendant a fair and impartial trial. Do you feel that you fall within that class of person? A. Yes.

Q. Do you know of any reason whatsoever why you can't sit in this case and decide it solely upon the evidence? A. No."

Mr. Jones was accepted as a juror.

The examination of the second person called was indicative of the careful insistence of the judge that the jurors have no bias or prejudice. The court's questions and the candidate's answers were:

"By The Court:

Q. Do you mean that you could not decide this case strictly and wholly on the evidence and the charge

of the Court? A. I am afraid not. This friend is still very critical.

Q. Because of that experience you think that will intrude upon your deliberations here?

A. Yes."

The court asked the third prospect "You are saying that in no event would you vote for the death penalty?" The answer was "Yes, Your Honor." The prosecution challenged for cause and this was allowed.

The defense led off with the questioning of the next member:

"Q. You realize that this is a case in which the defendant is charged with murder and that the prosecutor is seeking the death penalty. Do you know any reason why you could not sit in this case and try and determine it without any bias or prejudice one way or the other and arrive at a verdict in the case? A. Yes.

THE COURT: You don't know any reason why?

THE JUROR: No, I don't have any reason."

Both sides again stressed that they wanted a jury with an open mind without any bias or prejudice one way or the other.

The above was the pattern of the voir dire interrogation of the entire 154 men and women examined. A proportionately great number of them stated an abiding objection to capital punishment and were properly excused. Others had physical conditions, the care of sick relatives and business reasons which rightly called for being released from service. To a large extent the above conditions developed immediately and were passed upon at once. Therefore in those instances the prime questions above detailed were not asked. In every other examination which reached the fundamentals of the prospect's ability to judge the evidence without bias or prejudice, etc., the absolute

necessity of those people selected as jurors being absolutely fair and impartial was constantly and strongly impressed upon the individual panelists and the whole group present. Some of these had read newspaper stories of the killing involved and had thereby become prejudiced and were excused for that reason. Others had not been affected by newspaper stories. The forty-seventh person examined had read newspaper articles and had been influenced by them. He said "Well, I don't know as I couldn't sit on the jury but I don't believe I would turn a man loose to do it the third time." The prosecutor who was interrogating immediately advised the court that he believed "* * * this man has certain opinions concerning this case * * *." The defense examined the man at length and he said "* * * I would endeavor to do my best, to start all over", but he was not sure he could. The judge from the bench once more detailed the sine qua non in order to qualify for service on the jury saying:

> "Q. And you are further saying, I take it, that you could not decide this case solely and wholly on the evidence that's adduced in this courtroom and on my charge, that your reading of the newspaper article would intrude itself upon your consideration?
>
> A. Of course I haven't heard all the evidence. There could be a change of opinion that way.
>
> Q. Are you saying that you could not decide this case wholly and solely on the evidence which is adduced in this courtroom and my charge of the law? Is that what you are saying? A. No, sir.
>
> Q. You could not do that? A. No.
>
> THE COURT: I will grant your motion I will excuse him for cause."

Throughout the complete, searching questioning of the 154 persons called for jury service there is not the slightest intimation that anything mentioned during the venire interrogation affected those examined later in even the slight-

est degree. Where such item was referred to at all, it was substantially as with the twenty-fifth person called whom the defense queried as follows:

> "Q. Now, do you know anything about this case other than what you have heard about it here? A. That's all, what I heard here.
>
> Q. Do you know of any reason why you couldn't sit on this jury and arrive at a verdict in accordance with the evidence adduced in the trial? A. No.
>
> Q. If you were selected as a juror in this case do you think you could approach the case with an open mind? A. I could.
>
> Q. Would you be able to presume and consider the defendant as innocent throughout the trial until you heard all of the evidence and the Judge's charge? A. I could."

The forty-eighth person examined immediately after number forty-seven above mentioned, was suffering from a nervous disability and because of it was excused. The forty-ninth member of the venire was taking care of his sister seriously ill with asthma, and was excused without other questioning. The fiftieth one was excused by reason of his opposition to capital punishment. The fifty-first, fifty-second, fifty-third and fifty-fourth were let go for reasons of business, health, opposition to capital punishment and again, health.

The fifty-fifth person called, a lady, very well illustrates the total lack of impact upon the venire of previous questioning of and comment by members of the panel as they were examined one by one. She was asked, "Well, have you formed any definite opinion with regard to this case?" She answered *"I don't know anything about this case."* (Emphasis supplied).

The only other instance of any reference whatsoever to the prior crime was by the 151st talesman called. He after 3½ pages of examination by counsel, was asked by

the trial judge "Well, are you saying that from a reading of the newspaper accounts of this case you have come to a conclusion as to the guilt or innocence of this defendant? Is that right? A. Well, yes. The fact that this man had done this before * * *." That was everything said by the talesman on the point. The judge continued to examine him, finally asking, "Well, will you decide this case solely on the evidence which is heard here in this courtroom?" The answer was "*Yes, sir.*" (Emphasis supplied). Counsel queried "Can you approach this case with an open mind?" The court said "Well can you? It's a very simple question." The answer was "Well, yes, sure, surely." Counsel, stating that the presumption of innocence of a defendant in any criminal case "* * * cannot be removed from him unless and until, after a consideration of all the evidence, you find the defendant guilty beyond a reasonable doubt", then asked the juror, "Can you approach this case and sit through the trial of it understanding that and bearing that foremost in your mind?" Answer "I can". Asked that "If after a consideration of the evidence in this case you have a reasonable doubt as to the guilt of this defendant, would you acquit him?", the talesman replied "If I had a reasonable doubt, well, I guess so, yes, sir. Q. *Are you sure?* A. *Yes sir.*" (Emphasis supplied).

The voir dire examinations of every one of the venire down to and including the last person questioned (who was the 154th panel member passed upon) have been conscientiously studied. With no reservation, that thorough check out of all the 154 separate examinations reveals that the remarks of Nos. 47 and 151 are the sole such comment in the record. If they were heard by anyone other than counsel and the court, it is fair to conclude that no attention was paid them. Actually there was no reference to either remark thereafter directly or indirectly. Indeed it is obvious from the entire voir dire record that the venire generally attached no importance to what was said in the course of the interrogations. There are several specific

instances of that, two of these illustrate the overall feeling. The seventieth person examined and who was chosen as a juror was asked by the defense and answered as follows:

"Q. Do you feel that if you were selected as a juror you could approach this case with an open mind? A. Yes, sir.

Q. Have you read anything about this case? A. No, sir, I have not.

Q. Has anyone talked to you about it? A. No, sir, only what I heard here since yesterday. That's all.

Q. Other than what you heard in the courtroom is the only thing you have heard? A. Yes, that's right.

Q. So that you have no feelings or no thoughts one way or the other. A. No, sir.

Q. And if you are selected as a juror in this case would you be willing to give the defendant every reasonable doubt that arose from the evidence or lack of evidence in this case? A. Yes, I would, sir, yes, sir.

Q. And are you willing to start out the case with an open mind presuming the defendant to be innocent of the charge? A. Yes, sir."

The 116th venireman was questioned by the defense attorney and answered:

"Q. Mr. Jinks, in what section of Belleville is William Street? A. The valley; below the avenue.

Q. Yes, I know where you mean. If you were selected as a juror in this case, would you approach the case with an open mind, presuming the defendant to be innocent of the charge? A. I would, sir.

Q. Have you read anything about this case? A. No, sir.

Q. Have you heard anything about the case other than what you have heard here in the courtroom?

A. No, just in the jury room, just odds and ends.

Q. And from what—— A. Of no importance.

Q. What? A. No importance.

Q. And from what you have heard, have you any preconceived idea as to the innocence or guilt of the defendant? A. No, sir."

There was no motion to discharge the venire because of the remarks by Nos. 47 and 151 or anything further regarding them. We are firmly convinced that this was in the exercise of sound judgment by the competent, widely experienced defense lawyers. As is seen the prosecution had nothing to do with the incidents other than to end the first one at once by its matter of fact motion. The second instance affirmatively establishes that talesman No. 151, once he understood his duty as juror, completely accepted his responsibility to act in accordance therewith. We are also satisfied from the whole record that there was no harm to defendant, certainly no substantial harm, by reason of the remarks.

The entire selection of the jury was in strict accord with the landmark New Jersey voir dire opinion in State v. Rios, 17 N.J. 572 (1955). See also In the Matter of the Petition of Leo Robert Forcella for a Writ of Habeas Corpus, 40 N.J. 309 (1963), concurring opinion, Schettino, J., 311, et seq.

This brings us to the oral argument contention that defendant's prior crime was injected directly into this trial by the prosecution. The statement is made on behalf of appellant that "* * * the Prosecutor erroneously states (a) that the defense disclosed the first 1948 killing to the jury;". The transcript shows that this is exactly what defendant himself did and even a cursory reading of it reveals it not as appellant's brief would have it "* * * a wild attempt at mitigation * * *" but an elaborate, skillfully stated life story by the defendant covering down to and including the slaying before us. This took 32 transcript pages to unfold in direct examination. In that testi-

mony defendant gave a detailed account of what he asserted he knew regarding the 1948 crime to which as he stated he "pleaded non vult to second degree murder." He explained at length that as to the 1948 crime he had no recollection of hitting his wife over the head with a cue stick and after that, shooting her.

In telling about the instant killing with his shot gun, defendant claimed that from just before the shooting he again knew nothing of what happened until after he was taken and put into a patrol wagon by the police. The cross-examination was directed against the credibility of that story. This was not only properly motivated but the prosecutor would have been affirmatively neglecting his duty had he failed to so act. If defendant's narrative had been believed by the jury it would have at least saved him from a first degree murder conviction. His own evidence plainly indicates that it was a shrewdly planned, carefully contrived effort to achieve that result. His basic strategy was to plausibly account for the damning fact that he in a similar crime of violence twelves years before had shot and killed his wife. He claimed as stated that he had blacked out at that time and had no knowledge of what he had done. He virtually repeated that same kind of tale about his wanton slaying of Miss Wetzel, i.e. that he had again blacked out and did not remember anything.

Far from the state having any connection with the introduction of appellant's murder of his wife back in 1948, it was appellant on direct examination who, after giving that whole awful account, went into elaborate detail about pleading non vult to second degree murder, being sentenced "to twenty-five to thirty, and served ten years and thirteen days." After that he told about his hearing before the Parole Board in 1958, how he was paroled January 6, 1959, how he had met Miss Wetzel while he was in prison and she was visiting another inmate, how he contacted Miss Wetzel after he returned home and that they became engaged and on and on for 19 more pages of direct examina-

tion which wound up with him on February 4, 1960 drinking and quarreling with Miss Wetzel. His lawyer at that point asked Forcella "Then what happened?" Forcella replied, "I don't know." All that had happened was that Forcella with his shot gun had shot Miss Wetzel to death.

Appellant urges that our decisions in United States ex rel. Scoleri v. Banmiller, 310 F.2d 720 (3 Cir. 1962) and United States ex rel. Rucker v. Myers, 311 F.2d 311 (3 Cir. 1962) are pertinent to this issue. The problem in those decisions has no bearing upon the precise factual situation before us.

Out of all the remaining assertions of appellant there is one more contention now stressed which of necessity must be presented in some detail. It is said in appellant's brief that "Forcella was denied due process of law by the suppression of evidence on his behalf both by the State of New Jersey and with the knowledge of the State's representatives." At this stage what is left of the above charge concerns the appearance of Chairman Ashby of the State Parole Board as a witness subpoenaed by the defense. The State of New Jersey, appearing by an Assistant Attorney General, was opposed to the Chairman being a witness. There was a conference between the court and all the attorneys. An affidavit by one of the trial defense lawyers, submitted by appellant, states what then occurred, "A discussion as to what Mr. Ashby would testify to and as to what records were privileged ensued. As a result a stipulation was entered into in open court regarding the New Jersey Parole Board records." In compliance with the above the report of the Parole Board's supervising psychiatric consultant on his pre-parole hearing examination of Forcella was turned over to the defense. That examination had been made in August, 1958 and the written report of same given the Board later. Forcella was released on parole January 6, 1959, after having served ten years in prison. The report was introduced into evidence as a defense exhibit and read to the jury by the senior

defense lawyer. The expressed interest then and at this time by the defense in the Parole Board evidence was and is in the alleged blackouts of Forcella while confined.

The report characterizes Forcella "* * * functioning in the bright average intellectual range with potentials that go to the superior to very superior range." It should be mentioned in this connection that Forcella testified that he had studied law and had served as law clerk with Newark lawyers for seventeen years. His testimony covers 100 pages of the transcript. The type of witness he made could be gleaned from almost any portion of his evidence. A fair example is the following on his direct examination in chief:

> "Q. Did you ever use the term in talking to Marion or did you ever refer to her as 'you bitch'? A. That's right, I did.
>
> Q. And what did you mean by that? A. My interpretation of bitch is supine, clever, in business acumen, wise, worldly-wise, intelligent. She was wise and she was intelligent, shrewd."

The above mentioned psychiatrist was a defense witness. He categorically stated that Forcella in the one and a half to two hour examination did not complain to him of any blackouts during the time he was confined to State's Prison. As a fitting finale to the blackout evidence there is Forcella's own fantastic story on the question of prison blackouts. On direct examination he testified:

> "Q. Now you were in prison from Christmas, 1948, until January 6, 1959, were you not? A. Yes.
>
> Q. During that period of time did you ever have any spells where you lost all recollection of what had happened? A. A half a dozen times, sir.
>
> Q. And will you tell us when these occurred and what occurred? A. Well, five or six times they occurred in the cell, and when I would wake up it would be as if I was just coming out of a state of suspended

animation.' Three or four times they tell me I was walking around there with mouth open, eyes in the air.''

On cross-examination appears the following:

''Q. As I understand it, you testified while you were in State's Prison you blacked out about six or seven times? A. That's right, sir.

Q. Is that correct, sir, when I say six or seven times? A. That's right, sir.

Q. Or was it more than that? A. Well, I can only remember that.

Q. Do you always remember when you black out? A. No.

Q. But you remember six or seven times? A. That is correct. Because I used to walk around in a trance.

Q. Who told you you walked around in a trance? A. The inmates.

Q. *How about the guards?* A. *Well, they didn't know it.*

Q. Do you recall when is the first you blacked out? Was it in State's Prison or Rahway? A. At Rahway, sir.

Q. And when was it, sir? A. The second year I was there.

Q. How did you find out that you had blacked out? A. Some inmate that was there, that lived in Camden, saw me walking around in a trance, he said, and he was leading me around.

Q. *Did you report it to the guard?* A. *No, sir.*

Q. *Did you report it to the institutional doctor?* A. *Well they don't do that, the inmates.''* (Emphasis supplied).

* * *

Q. You say you recall six or seven times that you blacked out. On each of those occasions did you ever

report it to the doctor? A. *No, sir, I just—I just report severe migraine headaches to the doctors.*

Q. Did you ever report to the doctors that you suffered a blackout while you were in these institutions? A. Sometimes I did.

Q. What? A. I believe I did.

Q. When did you report it? A. I don't know, sir.

Q. Well, see if you can approximate the time. The first blackout you had, when did you report that, sir? A. I wouldn't know.

Q. Did you report the first blackout? A. I certainly did.

Q. *You did report the blackout?* A. *I didn't report the blackout, I report severe migraine headaches, that I was blacking out.*

Q. *Did you tell them you were blacking out?* A. *No, sir.*

Q. *You did not?* A. *No, sir.*" (Emphasis supplied).

After that the witness switched his story. Asked, "And when you reported the so-called migraine headaches, did you report to any doctor or anyone in authority that you had blacked out? A. That's right, half a dozen times." A little further into his testimony he said he suffered his first blackout in State's Prison after being there two and one half months; that three people were in the cell with him; that he doesn't know their names. After that he said "I was taken out of the cell and brought to a hospital * * * by the officer—the guard that was on duty." He doesn't know the name of the guard. Asked "And were you taken to the institution hospital?" He answered "*I walked to the institution hospital.*" (Emphasis supplied). Even in this detail there seems to be some defense confusion as to what the witness did really claim in his various contradictory statements. Asked regarding his Rahway imprisonment, "*Now, do you recall telling any doctors at Rahway that you had blacked out?*" His answer was "*No*". (Emphasis

supplied). Right after that, he changed his answer and said, "Yes I told the doctor that visit that morning." He did not know the doctor's name.

Forcella was recalled to the stand, as the last witness in the trial. The short direct and cross-examination starkly reveals the net product of his endeavors to support the theory of prison blackouts.

"Direct examination by Mr. Sommer:

Q. *Mr. Forcella, it has been testified here that on a number of occasions you were treated, while you were in prison, for migraine headaches.* Will you tell us what brought on those headaches. A. *When I used to blank out.* When I woke up, when I came to, I had pounding headaches from the top of the head all the ways down to the bottom of the neck for about thirteen hours.

Q. And did you tell the doctors of that condition? A. *I told the doctor about the pounding, about the severe headaches.*

Q. *And did they ask any other questions about it?* A. *No other questions.*

Mr. Sommer: That is all. You may cross-examine.

Cross-examination by Mr. Lordi:

Q. You say you told the doctors about the severe pounding at the back of your head? A. That's right, sir.

Q. And you say the severe headaches were brought on by these blackouts? A. Yes, sir.

Q. Did you tell them about the severe pounding? A. That's right.

Q. *Did you tell them about the blackouts?* A. *I did not; he did not ask.* (Emphasis supplied).

Mr. Lordi: No further questions.

Mr. Sommer: The defense rests."

In the light of the above evidence, the citations advanced favoring the present argument for appellant on this issue have no bearing here. We have before us what was in fact a simple, fundamental incident of trial practice. Senior counsel for the defendant was one of the top criminal lawyers of the State. He was and is of the highest standing at the bar and was assigned to this defense by the New Jersey Superior Court. His junior associate was and is one of the finest type lawyers in that trial area. Those attorneys, as their considered opinion under all the peculiar circumstances decided it was unwise from the defendant's standpoint to become involved in a controversy with the head of the State Parole Board over the question of whether the Board's proceedings were privileged. Sound thinking was bound to conclude that no good could come from the records, if any. Certainly on the defendant's clear admissions there was nothing in them about blackouts. Assuming the improbable, if there was some note regarding migraine headaches, the one thing the defendant was consistent about was that his stated headaches came *after* the so-called blackouts. There was no medical evidence of connection between the two.

For the purposes of this appeal the defense trial strategy is criticized. From the clear facts before us it was a justified decision by trial counsel. There was no suppression of evidence by the State of New Jersey. Nor was there any star chamber proceeding. It was a proper trial conference between the court and all the attorneys. It was within the authority of the defense counsel. State v. McMillan, 65 N.J.Super. 478, 483 (App. Div. 1961); State v. Bentley, 46 N.J.Super. 193, 201-202 (App. Div. 1957). It was the same sort of proper trial conference that goes on daily in every trial court. The result of that conference was placed on the record in open court in the presence of the defendant. There was nothing technical about it. In lieu of the Parole Board Chairman being called as a witness the psychiatric report was given the defense. If

Forcella had not agreed to that, he could have, and with his background and personality, it is not too much to presume, would have so told his attorneys. The district judge brings this frivolous claim of "suppressed evidence" sharply into focus and soundly disposes of it in his opinion as follows:

> "It appears from the transcript that certain stipulations were entered into between respective counsel. The stipulations obviated the appearance of a Superior Court Judge and the Chairman of the State Parole Board, both of whom had been subpoenaed by the defense. It was stipulated, and it appears in the record, that if the Judge had been called he would have testified that on an occasion Forcella visited him in his Chambers to inquire of him whether he would perform a marriage ceremony between defendant and the decedent. This merely corroborated testimony given by the defendant.
>
> "The other stipulation was that if the Chairman of the Parole Board had been called he would have testified that a psychiatric report, which was admitted into evidence and read to the jury, was submitted to the Board in August, 1958 and after a hearing in September, a parole was granted effective January 6, 1959. There was no contention made that the stipulations were not in accord with the facts which were submitted to the jury.
>
> "These stipulations, which were worked out between counsel and the Court, did in no wise impair the fairness of the petitioner's trial. 'In New Jersey as in other states, it is settled that an attorney in a criminal case has implied authority to make stipulations and agreements incidental to the management of the defense in matters of trial procedure and the defendant is bound thereby.' State v. Ciniglio, 57 N.J.Super. 399, 406 (App. Div. 1959), cert. denied 31 N.J. 295

(1960). However, although Forcella was not present when the stipulations were made he was present when his attorney placed them on the record in open Court. Under such circumstances, we can assume that he consented to his attorney's procedure.

* * *

"The petitioner's brief attempts by way of inuendo and aspersion to challenge the propriety of the matters discussed in Chambers. It is not unusual in a trial of extended duration for the Court to confer with counsel in Chambers in regard to various problems and procedural matters which may arise. The defendant is safeguarded in these proceedings by the presence of his counsel. Matters such as jury instructions are in the legal province of the Court and the petitioner's brief itself labels this 'not significant in itself'."

We have closely examined all other points urged on behalf of the appellant. They are without merit.

The judgment of the District Court will be affirmed.

FREEDMAN, *Circuit Judge,* dissenting.

I respectfully dissent. The majority opinion has powerfully depicted the fairness of the trial judge in the conduct of the proceedings by referring to the numerous instances in which jurors were excused for cause and others were given the opportunity to say whether they were open-minded. It has concluded from this that the jury before whom the appellant was tried for his life had not been infected by any prejudice and that in any event the jury's knowledge that he had committed an earlier murder did him no harm because it was connected with his defense that he had blacked out, as he had also claimed on the first murder.

The undisputed principle which is our starting place is that evidence of appellant's murder of his wife under

similar circumstances twelve years before would not have been admissible here, since such evidence, although relevant, is inherently and unduly prejudicial. *Michelson v. United States,* 335 U.S. 469, 475-76 (1948); see *United States ex rel. Scoleri v. Banmiller,* 310 F.2d 720 (3 Cir. 1962), cert. denied, 374 U.S. 828 (1963); *United States ex rel. Lowry v. Myers,* 364 F.2d 297 (3 Cir. 1966). Yet here it was the appellant's counsel in his opening statement, and the appellant himself on direct and cross-examination, who brought in the circumstances of the prior murder. The majority attributes this to trial strategy on behalf of the appellant. It seems to me at least equally attributable to the fact that the prior murder had already been revealed in the course of the *voir dire* examination and to the Hobson's choice that faced the trial strategist of either ignoring the devastating fact of the prior murder or encountering it head on and emphasizing the circumstances of blackout which the appellant had claimed surrounded it.

There are two instances in which the fact of the prior murder was mentioned in the presence of the venire. After four jurors had been impaneled a venireman whom the prosecutor asked whether he could sit on the jury, replied: "Well, I don't know as I couldn't sit on the jury but I don't believe I would turn a man loose to do it the third time." This was not the only such remark. After thirteen jurors had been impaneled [1] another venireman in acknowledging that he had read newspaper accounts of the crime referred also to the prior murder. When asked by defense counsel whether the newspaper accounts led him to a conclusion as to the appellant's guilt his reply was: "Well, yes. The fact that the man had done this before—."

What the majority opinion calls "the damning fact" that appellant had shot and killed his wife twelve years earlier was therefore twice mentioned by prospective jurors in the presence of the panel and of those jurors who had

1 Additional jurors were to serve as alternates.

already been selected to serve. I therefore believe that it cannot be said that defense counsel's trial tactics were not traceable to a fear of how the jury might be affected by knowledge of the prior murder if the appellant had not attempted to explain it. Whatever may be said the other way, sufficient doubt hovers over the question which in a death case we must resolve in favor of the accused. As Mr. Justice Reed stated in *Andres v. United States,* 333 U.S. 740, 752 (1948): "In death cases doubts such as those presented here should be resolved in favor of the accused."

It is true that no objection was made at the time by appellant's counsel, but it is equally true that the court made no effort to remove the harmful effect of this information from the minds of the jurors. The New Jersey courts, as the majority points out, permit *voir dire* questioning to be conducted in the presence of the entire panel. *State v. Rios,* 17 N.J. 572, 112 A.2d 247, 254-56 (1955). But they also have been quick to recognize the possibility of prejudice to a defendant in this procedure and therefore have held that the trial judge should respond to the disclosure of improper facts either by admonishing the jury to disregard them or by declaring a mistrial. *State v. Hunt,* 25 N.J. 514, 138 A.2d 1, 12 (1958); *State v. Ernst,* 32 N.J. 567, 161 A.2d 511, 515 (1960), cert. denied, 364 U.S. 943 (1961). Neither course was followed here, although the wrong was twice committed.

Nor do I believe the record justifies the assertion that appellant's claim of blackouts inevitably would have driven him to the recitation of the circumstances of the murder of his wife twelve years earlier. There is enough in the record, including his counsel's opening statement and appellant's own testimony, to indicate that he could have attempted to show blackouts while imprisoned for the first offense. Indeed, it is difficult to perceive the shrewdness and cunning attributed to the appellant in paralleling his defense here to that in the prior case in which he pleaded non vult and was sentenced to imprisonment for second

degree murder, when he could have made the claim of blackouts in prison without going into the circumstances of the prior crime.

I would hold, therefore, that appellant was denied due process of law because the jury that tried him was one in whose presence two veniremen had referred to the prior murder without even an admonition from the judge that these statements should be disregarded. I am unable to accept the notion of a courtroom so sterilized that none of the jurors who had already been selected and the large number of veniremen in attendance was infected in the slightest degree by the express statements that the appellant in a widely publicized murder charge had also committed an earlier murder. I am therefore unable to agree that the defense in laying before the jury the detailed circumstances of the prior murder was simply pursuing the tactical maneuver of claiming that he had suffered earlier blackouts.

This leads me to another claim of the appellant's able counsel. Appellant had subpoenaed the Chairman of the New Jersey Parole Board to produce certain Parole Board records. On the Chairman's arrival, accompanied by an Assistant Attorney General who opposed his giving testimony, counsel for both sides were called into the judge's chambers, where neither the appellant nor the court reporter was present. An affidavit of appellant's trial counsel alleges that after the state opposed admission of the Chairman's testimony and of the records the parties agreed on the admission of one document, the psychiatric report of the prison's consulting psychiatrist, who testified at the trial. Appellant claims that the suppressed reports would have aided his defense of blackout by demonstrating the truth of his assertion that he had blacked out in the early weeks of his original imprisonment and had been carried to the prison hospital by guards.

In the leading case of *Snyder v. Massachusetts*, 291 U.S. 97 (1934) it was held that due process does not re-

quire that a defendant be present when the jury and trial counsel are taken to the scene of the alleged crime for a view. Mr. Justice Cardozo there stated that a defendant's presence is constitutionally required only when he can contribute something to his defense by being present. The proper application of this test is demonstrated by two recent cases in the Fourth Circuit. In *Near v. Cunningham,* 313 F.2d 929 (4 Cir. 1963), the exclusion of the defendant in a state trial from the judge's chambers, where an agreement was made among the trial judge and counsel not to sequester the jury during recesses of the court, was held to violate the defendant's constitutional right to due process where the decision resulted in exposing the jury to prejudicial remarks. On the other hand, in *Root v. Cunningham,* 344 F.2d 1, 4-5 (4 Cir. 1965), cert. denied, 382 U.S. 866 (1965), it was held that the defendant had no constitutional right to be present during the consideration of instructions by the trial judge and counsel in chambers where there was no evidence of resulting prejudice. Reconciling the two cases, the court said that the defendant's presence would have been important in *Near,* but useless in *Root:* "Near . . . had a better opportunity to know the attitudes of these people [in and outside the courtroom] than his attorney or the court. . . . Under such circumstances, had he been permitted to attend the conference, he could have informed the court of this hostility and, perhaps, thus prevented the making of the decision which exposed the jury to it to his disadvantage." In *Root,* however, only legal points beyond Root's competence were discussed outside his presence. 344 F.2d at 4-5.

In my view the present case is stronger than the situation in the *Near* case. Appellant was prejudiced by his absence from the conference which deprived him of possible evidence of prior blackouts while in prison, a subject of supreme importance to his defense. It was not a legal technicality beyond appellant's grasp, for the contribution he could have made at the hearing in chambers on the

parole records would have come from his personal knowledge of the facts, not his opinion on the law. It is a striking illustration of the familiar circumstance that counsel inevitably requires the presence of the client to bring to his attention those facts which are peculiarly within the client's own knowledge.

Because of the grave prejudice to the appellant, resulting from the disclosure at the *voir dire* of a prior murder and because of his exclusion from the proceeding in chambers involving the Parole Board records, I cannot entertain that assurance that the defendant received a fair trial which alone would justify sending him to his death.

I therefore respectfully dissent.

A True Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 15,120

IN THE MATTER OF THE PETITION
of
LEO ROBERT FORCELLA,
for a Writ of *Habeas Corpus*,
Appellant.

(D. C. Civil No. 616-63)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

Present:

McLAUGHIN, GANEY and FREEDMAN, *Circuit Judges.*

Judgment

This cause came on to be heard on the record from the United States District Court for the District of New Jersey and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court of August 4, 1964 be, and the same is hereby affirmed, with costs.

ATTEST:

THOMAS F. QUINN
Clerk

January 17, 1967